UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JAY MILLER, *et al.*, Plaintiffs, vs. CHRYSLER GROUP LLC, Defendant.	:	Case No. 3:12-cv-760 (MAS)(DEA) Hon. Michael A. Shipp United States District Judge **MOTION RETURNABLE**: February 18, 2014

CHRYSLER GROUP LLC'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

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I. INTRODUCTION

Chrysler Group has moved to dismiss the Second Amended Complaint, ("SAC") on various grounds. Plaintiffs' have now responded to that Motion.[1] Plaintiffs' arguments are long on rhetoric and short on fact (or legal support).

II. FACTS

In their Statement of Facts, Plaintiffs merely repeat the bald, conclusory allegations of the SAC. By way of example only, they cite to the SAC as alleging that Chrysler Group "touted" ***Jeep*** vehicles as able to "withstand rain, snow, sleet and wet and rough off road terrain."[2] *See* SAC, p. 1. Yet, Plaintiffs do not, and cannot, cite to any allegations of ***fact*** about where and when any such statements were made, or supporting the notion that they saw such representations. And, while they cite to allegations regarding when a sunroof leak allegedly occurred in three of Plaintiffs' vehicles, they do not even try to convince this Court that they have pleaded any such facts for the other eight Plaintiffs (and they have not). Id. at p. 2. Nor do Plaintiffs dispute the fact that most of the TSBs and the RRT that they attached to the SAC do ***not*** relate to their vehicles, and that some do not even relate to vehicles in the purported class. And, notably, when Plaintiffs argue about a purported 3 year/36,000 mile warranty, they cite to the internet for its existence instead of anything pleaded in the SAC.[3] Id. at p. 3. This is because there is no mention of any such warranty in the SAC.

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[1]*See* Plaintiff's Brief in Opposition to Defendant Chrysler Group LLC's Motion to Dismiss Plaintiffs' Second Amended Complaint, Docket No. 54 ("Pl. Opp.").

[2]This case is about more than just "Jeep" vehicles. The fact that Plaintiffs argue from statements that address only those vehicles highlights the significant pleading problems inherent in the SAC.

III. ARGUMENT

A. THE SAC VIOLATES THE BANKRUPTCY COURT STIPULATION AND ORDER AND THUS SHOULD BE DISMISSED.

Plaintiffs do not dispute that they are prohibited by a Bankruptcy Court Order from pleading any type of claim, other than warranty claims, on behalf of any person who owns a vehicle manufactured prior to June 11, 2009, and from seeking punitive, exemplary, special, consequential or multiple damages or penalties on behalf of such owners. *See* Pl. Opp., pp. 5-6. Nor do Plaintiffs dispute that most of them own vehicles manufactured prior to June 11, 2009, and, yet, all of them (including those owning such vehicles) profess to be bringing all the claims in the SAC including the non-warranty claims. Id. In fact, Plaintiffs outright admit that all of them (even those barred from doing so) seek relief prohibited by the Bankruptcy Court's Order. Id. As Plaintiffs acknowledge, the SAC violates the Bankruptcy Court's Order. It should be dismissed forthwith.

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[3] At times, Plaintiffs misleadingly offer a string cite to the SAC when they argue about a 3 year/36,000 mile warranty. *See, e.g.*, Pl. Opp., pp. 7. But the paragraphs Plaintiffs cite simply contain the word "warranty" and do not specify ***any*** purported terms, let alone a duration. Id.

B. THE SAC SHOULD BE DISMISSED BECAUSE IT DOES NOT SATISFY RULE 8(a)(2) OR RULE 9(b).

In seeking dismissal, Chrysler Group argues that Plaintiffs have failed to meet the pleading requirements of both Rule 8(a) and Rule 9(b). In a wholly conclusory argument, Plaintiffs baldly assert that the SAC satisfies Rule 8(a). *See* Pl. Opp., pp. 4-5. However, Plaintiffs acknowledge (at least implicitly) that the SAC is devoid of any facts sufficient to put Chrysler Group on notice of the very basic fact of which state's law each Plaintiff is invoking. *See* id. at p. 5 fn.1. And, the SAC cannot be saved by the fact that, ***for purposes of the current motion***, Plaintiffs are now willing to concede that the state law where each Plaintiff purchased his/her allegedly defective vehicle applies to each of their claims. Id. For one thing, what Plaintiffs are willing to concede ***at the moment*** is obviously irrelevant. And, for another thing, pleadings cannot be amended by responses to motions. *See, e.g.*, Piscopo v. Public Service Elec. & Gas Co., 2013 WL 5467112, *8 (D.N.J. 2013) ("Plaintiff cannot amend his pleadings with factual allegations made in opposition to a motion to dismiss"). And, notably, Plaintiffs do not even address the inherent contradiction in the SAC that the statute of limitations should be tolled due to their failure to discover the defect until "just before this Complaint was filed" while at the same time pleading facts demonstrating that at least some of them knew about a leak in the sunroofs of their vehicles ***years*** before this case was filed. These are just examples of the basic pleading insufficiencies in the SAC.

Plaintiffs do spend an inordinate amount of their argument trying to convince this Court that their fraud-based ***omissions*** claims satisfy Rule 9(b), although much of their discussion is simply a regurgitation of case law. *See* Pl. Opp., pp. 18-26. Notably, Plaintiffs do not even try to suggest that their affirmative misrepresentation claims meet the Rule 9(b) standard. And, Plaintiffs' contention that the SAC satisfies Rule 9(b) for purposes of their omissions claims is little more than wishful thinking. Plaintiffs argue that it is "crucial here" that case law supports a relaxation of Rule 9(b) for ***omissions*** claims because of an inability to specify exact information about when information was withheld.[4] Id. at pp. 21-22. But "relaxing" a standard does not mean that it does not apply at all. Indeed, in Majdipour v. Jaguar Land Rover North America, LLC, 2013 WL 5574626 (D.N.J. 2013) – the case principally relied on by Plaintiffs – the court required pleading much more than Plaintiffs have pled here. In Majdipour, the

[4]Plaintiffs are apparently conceding that their affirmative misrepresentation claims are not subject to any "relaxation" of the Rule 9(b) requirements (which they do not come close to meeting). A plaintiff, as the purported recipient of a misrepresentation, is in the best position to know and plead the required "who, what, when, where, and how" demanded by Rule 9(b). *See, e.g.,* Glass v. BMW of North America, LLC, 2011 WL 6887721, *7 (D.N.J. 2011) ("The justification is logical, while plaintiffs cannot be expected to plead facts solely within a defendant's knowledge or control, plaintiffs should be able to allege the specific advertisements, marketing materials, warranties or product guides that they each reviewed, which included this misrepresentation and when it was advertised" (citation and internal punctuation omitted)). If Plaintiffs were not the recipients of an affirmative misrepresentation then, obviously, they cannot base a claim on it.

court found the Rule 9(b) standard satisfied only because the plaintiffs had set forth ***specific*** facts relating to: exactly what information was purportedly withheld; the exact dates and places of each plaintiff's vehicle purchase; the exact dates and places of the repairs done to each plaintiff's vehicle; the precise documents provided to each plaintiff by the defendant where the purported withheld information should have been disclosed; and specific discussions they had with the defendant's employees wherein such information should have been disclosed. 2013 WL 5574626 at *15. Other than date and place of vehicle purchase, Plaintiffs here aver no such facts for each and every Plaintiff.[5] *See* SAC.

C. THE SAC SHOULD BE DISMISSED BECAUSE PLAINTIFFS AVER NO FACTS ESTABLISHING KNOWLEDGE.

Plaintiffs do not dispute that, for each of their claims to survive, they must plead ***facts*** establishing that Chrysler Group had knowledge of the purported defect in their vehicles ***before*** those vehicles were sold. Rather, Plaintiffs simply argue that they have adequately alleged facts supporting the notion that Chrysler Group had such knowledge based on the TSBs and RRT they attached to the SAC. *See*

[5] Plaintiffs stretch the bounds of credulity by citing to paragraphs 4, 5, and 6 of the SAC for the proposition that they have pleaded such facts. For example, Plaintiffs suggest that their generic reference in paragraph 4 to maintenance and sales booklets, and unspecified sales documents, somehow equates with the allegations in Majdipour that each plaintiff was handed a specific checklist relating to the condition of their vehicle. The analogy is baseless in light of the fact there is nothing in the SAC to suggest that any Plaintiff ever received, saw, or read ***any*** document, let alone one relating to maintenance or a sale.

Pl. Opp., pp. 26-31. In making this argument, Plaintiffs completely ignore the fact that most of the TSBs and the one RRT that they attach to the SAC have nothing to do with their vehicles (and some have nothing to do with any class vehicle). They likewise ignore the fact that there is not a single allegation in the SAC which suggests that the sunroofs that were subject to their attached TSBs and RRT are similar, in any way, to those in the vehicles they own, so that knowledge about one can be implied to be knowledge about the other. They also ignore the prior findings of this District that TSBs should not be used as a substitute for knowledge allegations. *See, e.g.*, Wiseberg v. Toyota Motor Corp., 2012 WL 1108542, *4 fn.2 (D.N.J. 2012). And, notably, they completely ignore the Third Circuit's recent holding in Gotthelf v. Toyota Motor Sales, U.S.A., Inc., 2013 WL 2169403 (3d Cir. 2013), about the extent of factual averments necessary to avoid dismissal. Plaintiffs do not mention Gotthelf, and they do not come close to meeting its mandates. The SAC should be dismissed.

D. THE ALLEGATIONS FAIL TO SUPPORT THE MANIFESTATION OF ANY DEFECT DURING THE WARRANTY PERIOD AND THUS ALL CLAIMS SHOULD BE DISMISSED.

There is not a single allegation in the SAC supporting the notion that any express warranty was still in effect when the sunroofs in Plaintiffs' vehicles allegedly leaked; indeed, there is not a single allegation of what the durational period was for any warranty. *See* SAC. Chrysler Group contends the entire SAC should be dismissed based on this pleading failure. Plaintiffs respond that the SAC should not be dismissed because they "allege that the defect manifested ***within*** the express warranty." *See* Pl. Opp., p. 9 (emphasis in original). This argument makes little sense in light of the fact that Plaintiffs admit that the warranty underlying their claims had some mileage limitation, and that they have not pleaded any facts to demonstrate there was a manifestation of any defect within that mileage limitation. *See* Id. at p. 9 fn.4. Equally perplexing is Plaintiffs' argument that they "need not allege they sought repairs during the warranty period." Id. at p. 10. In making this argument, Plaintiffs again ignore the recent Third Circuit case of Gotthelf which expressly held that allegations of failure within the warranty period are required to survive dismissal; rather than address this controlling authority, Plaintiffs resort to citing district court cases that predate this decision. Id. And, amazingly, even the parenthetical information Plaintiffs offer for some of these earlier district court cases indicates that a claim was sufficiently pleaded only because there was an allegation of a failure ***within*** the warranty period. Id.

E. EACH OF PLAINTIFFS' CLAIMS SUFFERS FROM ADDITIONAL FATAL PLEADING DEFICIENCIES.

1. Count I – Breach Of Express Warranty.

Chrysler Group has moved to dismiss Plaintiffs' express warranty claim on three additional specific grounds: (a) failure to set forth when and where the alleged representations of "high quality and sound functioning," "properly designed," and "good and serviceable materials" that underlie this claim were made or that Plaintiffs heard them, *i.e.*, failure to allege they were part of the "basis of the bargain"; (b) the statements underlying this claim are non-actionable puffery; and (c) failure to allege facts as to the duration of any warranty and why that durational limitation was unconscionable.

Plaintiffs start their response to these arguments by repeatedly referring to a "3-year, 36,000-mile warranty." *See* Pl. Opp., pp. 6-8. But, ***there is not a single averment in the SAC which mentions such a warranty***. Indeed, Plaintiffs specifically plead that their express warranty claim is based on statements about "proper design" and "good and serviceable materials." *See* SAC, ¶ 100. It is ridiculous for Plaintiffs to suggest that Chrysler Group is "pretend[ing] it does not know the warranty to which Plaintiffs' allegations refer" (Pl. Opp., p. 7), because Chrysler Group has never issued, and knows of no warranty which is in any way similar to the one that Plaintiffs have actually pleaded.[6] It is also silly for Plaintiff to suggest that this Court can "take judicial notice" of a "3-year, 36,000-mile warranty" (id. at p. 8), when Plaintiffs have never even pleaded the existence of any such warranty, have based no claim on it, and no such warranty has ever been presented to this Court. It is axiomatic that only documents referenced in a

[6]Of course, it is completely irrelevant whether Chrysler Group purportedly "knows" of a fact or not; it is Plaintiffs' burden to plead all facts relevant to their claims.

complaint, and forming the basis of a claim made therein, can be considered by a court in deciding a motion to dismiss. *See, e.g.*, In re Burlington Coat Factory Securities Litig., 114 F.3d 1410, 1426 (3d Cir. 1997).

And, notably, Plaintiffs offer no real response to the arguments Chrysler Group actually made in seeking dismissal. They do not even address the "puffing" nature of the statements that underlie their express warranty claim, and they do not point to a single pleaded fact which supports the notion that these "puffing" statements were part of the "basis of the bargain" struck by each Plaintiff. See Pl. Opp., pp. 11-12. Finally, in addressing Chrysler Group's argument that they have failed to plead facts supporting the notion any durational limit was unconscionable, Plaintiffs do not cite to a single averment about what the durational limits were. *Id.* at pp. 12.14. Rather, Plaintiffs again revert to arguing about a "3-year, 36,000-mile warranty" that is never mentioned in the SAC. Id.

2. Count II – Breach Of Implied Warranty.

Chrysler Group has moved to dismiss Plaintiffs' implied warranty claim on the additional ground that there are no facts pleaded supporting the notion that Plaintiffs' vehicles are unfit for their intended purpose of transportation, *i.e.*, that the vehicles are "unmerchantable." In their response, Plaintiffs expressly admit that the recognized intended use of an automobile is transportation. Id. at p. 16. And, even now, Plaintiffs do not suggest that there is anything in the SAC which supports the notion that any of them ever stopped using their vehicles for transportation. Id. at pp. 14-17. Rather, Plaintiffs resort to an argument that a sunroof leak can result in "inches deep" water "puddl[ing]" on one side of a vehicle, after which the vehicle "cannot be driven safely until all that water is somehow removed." Id. There is no such allegation pleaded in the SAC for each and every Plaintiff, or anything even close to it.

3. Count III – Violation Of The Magnuson-Moss Act ("MMWA").

Chrysler Group has moved to dismiss Plaintiffs claim under the MMWA based on three grounds: (a) contrary to Plaintiffs' allegations there is nothing in the MMWA which creates a duty to disclose; (b) there is no independent duty to repair absent the existence of a "full warranty" and Plaintiffs have alleged no such warranty; and (c) Plaintiffs have pleaded no viable state law express or implied warranty claims. In their response, Plaintiffs again revert to a discussion about a "3-year, 36,000-mile warranty" that is never mentioned in the SAC. *See* Pl. Opp., pp. 17-18. They then set forth cases that stand for the basic proposition that a MMWA claim can be based on a "full" or "limited" warranty. Id. But, Chrysler Group did not, and does not, contest this. And, notably, Plaintiffs offer no opposition to Chrysler Group's actual argument that the MMWA does not allow for their claim for failure to disclose. Nor do they argue that Chrysler Group ever issued any "full warranty" (and it did not).

4. Count IV – Injunctive and Equitable Relief.

Chrysler Group has moved to dismiss Count IV labeled "injunctive and equitable relief" based on the fact that there is no such independent cause of action, and because Plaintiffs have not pleaded facts establishing they have no adequate legal remedy. Plaintiffs offer no opposition to this part of Chrysler Group's Motion. Plaintiffs thus apparently concede Count IV should be dismissed.

5. Count V – Negligent Misrepresentation.

Chrysler Group has moved to dismiss Plaintiffs' claim for negligent misrepresentation for three additional reasons: (a) such a claim is not recognized in some states where Plaintiffs reside and purchased their vehicles; (b) the only "misrepresentations" Plaintiffs identify are those about the future performance of their vehicles and the Third Circuit has made clear that such claims cannot survive; and (c) there are no allegations as to when or where each Plaintiff heard any misrepresentation. In responding to these arguments, Plaintiffs do not dispute the fact that the state laws governing some of their claims do not recognize such a claim. *See* Pl. Opp., pp. 35-36. Nor do they deny the fact that the misrepresentations on which they base this claim are about future performance, and that the Third Circuit prohibits claims based on such representations. Id. Plaintiffs only argue that they have adequately pleaded when and where they heard the statements. Id. But, the portions of the SAC which Plaintiffs cite for this proposition do not support this contention, and, in any event, even if they did Plaintiffs' failure to contest that dismissal is proper on the other grounds raised renders this argument moot.

6. **Count VI – Violation Of The New Jersey Consumer Fraud Act ("NJCFA").**

In addition to the failure to meet the pleading requirements of Rule 9(b), Chrysler Group has moved to dismiss Plaintiffs' NJCFA claim because: (a) all eleven Plaintiffs plead this claim but only Miller and Vartanian have pleaded facts establishing their right to invoke the protections of the NJCFA; (b) Plaintiffs have failed to plead any actionable unlawful conduct because the affirmative misrepresentations underlying it, (*e.g.*, the vehicles are "well made" and "durable) are non-actionable puffery; (c) the SAC does not establish a duty to disclose under the NJCFA which imposes such a duty on a manufacturer only when it knows "with certainty" that a failure would occur; (d) there are no allegations of a component part failure within the warranty for each Plaintiff and the NJCFA does not compensate for component part failures occurring outside the warranty; and (e) the SAC is devoid of any allegation establishing causation because Plaintiffs do not allege that they ever had any communications with Chrysler Group, or that they saw or heard, or were otherwise exposed to, any alleged misrepresentations before purchasing their vehicles (or at any other time).

Plaintiffs argue only that they have met the requirements of Rule 9(b). They offer nothing in opposition to these other grounds. Count IV should be dismissed.

7. Count VII – "Unfair And Deceptive Acts And Practices".

Count VII of the SAC is a hodgepodge of claims under a multitude of state's laws, clumped together as one. In addition to failing to satisfy Rule 9(b), Chrysler Group has moved to dismiss this Count for the reasons that: (a) several of the state's laws Plaintiffs invoke do not allow for the class action they bring; (b) the claims brought pursuant to several of these state's laws are barred under the economic loss doctrine; and (c) the SAC is devoid of the factual allegations sufficient to support the elements of each of the laws Plaintiffs invoke.

Plaintiffs respond to these arguments by first suggesting that Chrysler Group has contested the pleading of "alternative causes of action." *See* Pl. Opp., pp. 33-35. This is pure fantasy as Chrysler Group did not even arguably raise such a contest. And, notably, Plaintiffs do not dispute any of the other arguments made by Chrysler Group, choosing instead to simply argue that the failure to plead a legally cognizable claim under one of the multitude of state's laws does not mean the entire Count fails because other state's law may be sufficient. Id. Plaintiff chose to bring a single claim. This Court should judge whether that claim is legally sufficient as it stands. It clearly is not.

8. Count VIII – Breach of Contract.

Chrysler Group has moved to dismiss Plaintiffs' breach of contract claim in Count VIII because there is no allegation that Plaintiffs had any contract with Chrysler Group with respect to the sale or lease of their vehicles. Plaintiffs do not offer any opposition to this argument. Count VIII should thus be dismissed.

9. Count IX – Breach of the Duty of Good Faith and Fair Dealing.

While failing to contest Chrysler Group's argument that no claim for breach of contract can be maintained because of a lack of allegations supporting the existence of any contract with Chrysler Group, Plaintiffs try to convince this Court that they can still maintain their claim in Count IX for breach of the duty of good faith and fair dealing. *See* Pl. Opp., pp. 36-38. But, as Plaintiffs make clear in the SAC, this claim is based on the existence of a sale or lease contract between Chrysler Group and Plaintiffs. *See* SAC ¶ 198. Thus, Count IX falls with Count VIII. Indeed, even in opposing dismissal of their good faith claim, Plaintiffs do not identify any actionable contract. *See* Pl. Opp., pp. 36-38.

10. Count X – Unjust Enrichment.

Chrysler Group has moved to dismiss Plaintiffs' claim for unjust enrichment on the grounds that (a) Plaintiffs admit they did not purchase their vehicles from Chrysler Group and such a claim requires a direct relationship; (b) unjust enrichment is not recognized as an independent tort cause of action; and (c) unjust enrichment is not a cognizable claim when a plaintiff received the product he purchased, and alleges only a misrepresentation of its quality. Plaintiffs first respond by arguing that a direct relationship is not always needed to maintain an unjust enrichment claim. *See* Pl. Opp., pp. 38-40. In support, Plaintiffs cite Stewart v. Beam Global Spirits & Wine, Inc., 877 F.Supp.2d 192 (D.N.J. 2012). The Stewart court expressly recognized that the majority view in this District is that a direct relationship is required, but went on to find that if a defendant committed a direct fraud upon a plaintiff with respect to a product purchase an unjust enrichment claim would be viable even if that defendant did not sell the product to the plaintiff. Id. Putting aside that this is the minority view, the problem with Plaintiffs' reliance on Stewart is that here the majority of Plaintiffs are barred by the Bankruptcy Court's Order from basing ***any*** claim on any type of fraud. Thus, to the extent Plaintiffs are claiming to be making a "Stewart-type" claim, it is barred. Furthermore, and in any event, Plaintiffs offer no opposition to Chrysler Group's other arguments that their unjust enrichment claim is not a recognized independent cause of action and that allegations of poor product quality are legally insufficient. Count X should be dismissed.

IV. CONCLUSION

For the reasons outlined herein, and in its opening brief, Defendant Chrysler Group LLC respectfully requests that this Court dismiss the SAC in its entirety.

Dated: January 31, 2013

Respectfully submitted,

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